United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-7412

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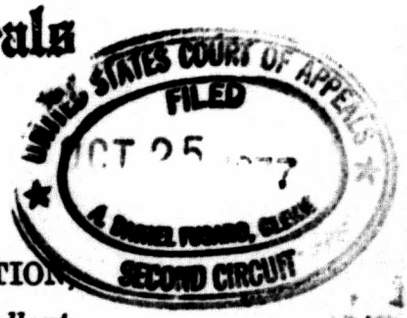
For the Second Circuit



SPRAGUE & RHODES COMMODITY CORPORATION,

Petitioner-Appellant,

against

INSTITUTO MEXICANO DEL CAFE,

Respondent-Appellee.

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On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

Cases **Page**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7412

SPRAGUE & RHODES COMMODITY CORPORATION,
Petitioner-Appellant,

v.

INSTITUTO MEXICANO DEL CAFE,
Respondent-Appellee

Appeal from the United States District Court
For the Southern District of New York

REPLY BRIEF OF PETITIONER-APPELLANT

PRELIMINARY COMMENT

In its answering brief appellee Instituto Mexicano Del Cafe ("Instituto") answers a great many arguments, including arguments of its own making, arguments not involved on this appeal, arguments improperly based on factual material outside the record and arguments which appear to relate to some other case entirely. Instituto totally fails to answer the arguments raised by the main brief of appellant Sprague & Rhodes Commodity Corporation ("S&R").

Instituto shipped 6,000 bags of coffee in explicit reliance on a letter and a telex, both of which incorporated by reference the terms of a written contract containing an arbitration clause. This written arbitration clause is clearly sufficient to satisfy the requirements of the Federal Arbitration Act (the "Act"), 9 U.S.C. §4. Instituto has sued on that contract. Can Instituto now repudiate the arbitration clause by claiming that it had no obligation to learn the terms of the agreement incorporated by reference?

We submit that it cannot. At the very least a trial is mandated to determine whether Instituto knew or should have known that it was binding itself to an agreement to arbitrate its dispute with appellant.

One other comment is necessary at the outset. Instituto's brief is replete with innuendos that S&R was (1) dishonest in its dealings with Instituto and (2) has deliberately failed to bring applicable facts and law to the attention of this Court. These slurs, which are also aimed at S&R's counsel, are as untrue as they are unworthy. Unfortunately, they are characteristic of Instituto's posture throughout these proceedings.

Judge Pierce rendered his decision denying S&R's

petition to compel arbitration on August 16, 1976 (A238-240*). The parties subsequently reached an agreement for settlement of the dispute (Instituto's brief, p. 16)**. The agreement was documented, approved by counsel for both parties and sent to Mexico for signature. Instituto then stalled for over eight months, first excusing their own delay as due to the change in the Mexican government and later, as that excuse became unworkable, finding other ways to avoid confessing that Instituto planned to renege on its agreement. When it finally became clear, in July, 1977, that Instituto would not honor its settlement commitment*** S&R successfully moved to reinstate this appeal.

In the year which had elapsed, however, and at the very same time Instituto had agreed to settle this case, Instituto had slyly pursued its Mexican action against Sprague &

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*Citations preceded by an "A" indicate the referenced pages in the joint appendix.

**These facts are part of the record in this matter by way of the affidavit of Leonard S. Baum, sworn to July 25, 1977 and submitted in connection with S&R's motion to reinstate this appeal (granted on August 11, 1977), the affidavit of Robert M. Blum (attorney for Instituto) sworn to August 2, 1977 and the affidavit of Leonard S. Baum, sworn to October 17, 1977 and submitted with S&R's motion to strike material not in the record from Instituto's brief, which will be filed concurrently with this reply brief.

***Instituto's claim that "counsel for both parties" found one part of the proposed settlement deficient is incorrect.

Rhodes to judgment. Instituto's brief (p. 16) states that Instituto succeeded in obtaining a default judgment on September 22, 1977 -- over a full year after Judge Pierce's ision and Sprague & Rhodes' notice of appeal were filed (A238-241)* and almost a full month after S&R's brief was filed -- just in time for Instituto's brief on this appeal.

S&R's instant petition to compel arbitration was filed less than two months after S&R was served with the complaint in Instituto's Mexican action. S&R diligently pursued its petition until it was dismissed by Judge Pierce and S&R immediately appealed that decision. Instituto's repeated assurances that a settlement had been reached persuaded S&R to hold its appeal in abeyance for a year. Upon finding out that Instituto had no intention of keeping its agreement to settle the matter, S&R immediately re-commenced this appeal. Instituto now spends an entire point in its brief arguing that its Mexican default judgment -- acquired only by taking advantage of S&R's good faith belief that the parties had reached a settlement -- must be accorded res judicata effect!

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*S&R is moving concurrently with the filing of this reply brief to have stricken from Instituto's brief all matter dealing with this alleged default judgment, since it has no factual basis in the record on this appeal.

Given these facts, S&R does not need to stoop to Instituto's level of innuendo. This Court is fully capable of assessing the dishonesty of Instituto's presentation.

Instituto's Brief is Replete With Factual Errors

In its main brief S&R took pains to set forth both parties' differing perceptions of the underlying events herein; Instituto presents only its own obsessive view of the case.*

The majority of Instituto's factual errors are irrelevant to the legal issues and need no refutation. Two particular distortions of fact in Instituto's brief, however, cannot stand unchallenged.

Instituto contends that S&R entered a special appearance in Instituto's Mexican action, then let the appearance

*This may account for Instituto's reprehensible and totally false charges that S&R "pocketed thousands of dollars refunded by Guzman," a charge which Instituto also made before Judge Pierce. S&R never "pocketed" anything. If appellee had bothered to read the affidavit of Donald Sperling, sworn to August 10, 1976 and submitted below, which responded to this very point (A226-227), it would have learned the terms of the purchases S&R believed it had made from three different exporters rather than just Instituto (these purchases are described at pages 5-8 of S&R's main brief). Under the terms of these purchases, S&R paid every penny.

Instituto's brief doesn't even have the good grace to mention to this Court that S&R had refuted the charges of impropriety below. Instituto's obvious intent was to "poison the well" against S&R.

"lapse" and initiated its petition to compel arbitration. This is not the case. The record contains the facts underlying S&R's inability to make a "special appearance" to contest jurisdiction in Instituto's Mexican action and its refusal to make a general appearance (A234-237). Instituto's brief never even alludes to these facts.

Instituto's treatment of the supposedly "expurgated" letter of July 31, 1975 from S&R to its representative Guzman is a similar distortion. This letter states that Green Coffee Association ("GCA") Contract 5437-F was "issued for registration purposes only and [does] not constitute a purchase on the part of the Sprague & Rhodes Commodity Corporation."* Instituto suggests that this is a shocking revelation and that S&R selectively quoted the letter to hide that the contract was not sent to effect a purchase. Perhaps Instituto failed to read S&R's main brief on this appeal, since that exact fact is set forth therein at pp. 7-8. It is also fully explained in the affidavit of Jack Bloom, S&R's vice-president, submitted below (A23-24). Here, too, Instituto's attempt to color the facts

*Instituto's brief announced, at p. 20, that "the complete text of that letter has only now come to hand, with the completion of the Mexican litigation." Nowhere in the record -- not even by way of supplementary affidavit -- does Instituto introduce a copy of the letter.

is designed to divert attention from the legal weakness of its argument.

Point I, infra, demonstrates that S&R's subjective intent that Contract 5437-F be used for "registration purposes" rather than for an actual purchase is legally irrelevant. Instituto acceded to the terms of Contract 5437-F, including its arbitration provision, by making an agreement which incorporated that contract by reference. Instituto ignores the real point of S&R's letter stating that Contract 5437-F was for "registration purposes." It shows that Guzman would have delivered tnis contract to Instituto -- a fact which Instituto hotly contests -- for registration. Instituto's assertion that it never received 5437-F or any of the numbered contracts from Guzman is cast into doubt by the host of other things Instituto received from Guzman -- the letter referred to above; a "confession" (A182-196); and hundreds of thousands of dollars clearly marked for S&R's account but which Instituto applied to Guzman's private debts (A30, 228, 231-233). It appears that Instituto and Guzman are quite close. Additionally, Instituto has never so much as offered an affidavit from the actual employee who dealt with Guzman. As demonstrated in Point II, infra, these matters raise issues of fact which can

only be resolved at a trial. We believe, however, that this Court can and should order the parties to arbitration as a matter of law.

POINT I

A Written Arbitration Agreement Exists and Was Specifically Transmitted and Identified to Instituto. Arbitration Should be Ordered As a Matter of Law

1. The Arbitration Agreement Was Incorporated by Reference

At Point I of its brief Instituto* stresses the need for a written arbitration agreement which must be transmitted or clearly identified by one party and accepted by the other. Instituto contends that since no arbitration clause or any reference to it was communicated to it (Inst. br., pp. 18-26) and since there can be no incorporation by reference of an arbitration clause which was not referred to or made available to it (Inst. br., pp. 26-31), no arbitration can be ordered.

The record establishes, however, that there is a written arbitration clause and that it was available upon request. Given these facts Instituto simply has no defense to

*Hereinafter referred to as "Inst. br."

arbitration. The specific, identifiable, written arbitration clauses were contained in Contract 5437-F (A74-75)*; in Contract 5481 for 1,000 bags to be purchased from Instituto (A76-77); all of the contracts previously executed by S&R and Instituto in 1970 and 1971 (A70-71); and in the three contracts which S&R believed to have covered the 6,000 bags of coffee in issue (A72-73, 78-79, 80-81).

Instituto concedes that (a) on July 31, S&R sent Contract 5437-F to Guzman to be delivered to Instituto for registration purposes (A23-24; Inst. br., pp. 20-21); (b) that on the same date Instituto received S&R's telex stating "We are also sending Contract 5437-F covering 3,000 bags ... the complete details should be given by our representative and on the contract." (A24; Inst. br., pp. 5-6) (emphasis supplied); (c) that it anticipated such a contract because Guzman's earlier letter to Instituto stated that S&R's order "shall be confirmed by the Purchase Agreement which is to be remitted by the buyer and shall also be confirmed by telex." (A109, 139; Inst. br., p. 5); (d) that Instituto never asked Guzman or S&R for a copy of the "Purchase Agreement" referred to by Guzman, or for Contract 5437-F referred to in the telex (Inst. br., p. 29) and

*This is no new argument, as Instituto would have this Court believe (A1-5, 13-36).

finally (e) that Instituto explicitly relies upon Guzman's letter and S&R's telex for the terms of its contract with S&R (A109; Inst. br., pp. 29, 34).

Instituto also concedes that on August 6, 1976 S&R sent Guzman Contract 5481 to purchase 1,000 bags of coffee from Instituto (A24-25), and that Instituto retained S&R's payment of $120,933.00 therefor (A25; Inst. br., p. 9).

Instituto also concedes that its predecessor agency (which bore a different name) received at least 8 GCA contracts from S&R in 1970 and 1971 (A21-22; Inst. br., p. 4); approved the terms of at least 50 additional purchases by S&R in 1972 through 1975 made on the same GCA form (A17-18, 106-107, 127, 225; Inst. br., p. 34); routinely receives the GCA form contract from other coffee importers (A 27); and that the bulk of the sales made to GCA members usually, if not always, are confirmed on a standard GCA contract (A106-107).

All these contracts contain an identical, extremely broad arbitration clause. The only question is whether Instituto must be held to have assented to that clause here.

Instituto repeatedly suggests that it could not have assented to Contracts 5437-F or 5481 because they were not delivered. At the very least this raises a question of fact.

Moreover, although delivery would reinforce S&R's entitlement to arbitration, it is unnecessary as to Contract 5437-F.

Instituto concedes that a document can be incorporated by reference although it is not delivered or attached to the incorporating document (Inst. br., p. 27). The cases cited by both parties require only that the referenced document be sufficiently described and available. If so, it becomes part of the contract as a matter of law. Whether the referenced document was delivered, seen, read or understood is irrelevant, as are the parties' subjective intentions.

Thus, the key (and only) question is whether Contract 5437-F which (a) contained a written arbitration clause (b) existed at the time of the sale, and (c) was available upon request of Instituto from Guzman or S&R -- was sufficiently described. Instituto's contention that the arbitration clause appeared in "unspecified fine print of an unidentified document retained in the possession of the other party' (Inst. br., p. 28) cannot pass muster.

The cases proposed to this Court establish beyond peradventure that Contract 5437-F is more than sufficiently described to become incorporated into the contract under the Act. Indeed, the Act requires far less specificity. In

Vespe Contracting Co. v. Anvan Corp., 399 F. Supp. 516 (E.D. Pa. 1975), a subcontractor was required by its subcontract to perform all work "in accordance with the General Conditions ... and other documents, if any (the 'Subcontract Documents'), prepared by the Architect and/or Engineer." Id. at 520, n. 4. The subcontract did not provide for arbitration and the referenced 'Subcontract Documents' only described the actual work to be performed. Id. at 520, 521. Moreover, the arbitration clause in "Miscellaneous Provisions" of the "General Conditions" of the main contract did not expressly require arbitration between the subcontractor and general contractor.* Although the subcontractor never signed the main contract or General Conditions, the court concluded that they were sufficiently incorporated by reference to create "a valid agreement to arbitrate." Id. at 521.

Similarly, in Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240 (E.D.N.Y. 1973), Bigge executed a subcontract with Docutel; Docutel had a general contract with Pan Am which included "General Conditions" requiring arbitration of disputes. Bigge's subcontract incorporated the

*The referenced document at bar, Contract 5437-F, specifically requires arbitration between purchaser (S&R), and seller (Instituto) of the coffee.

terms of the general contract by reference. Bigge contended that the arbitration clause was never mentioned until after Bigge sued for payment; that it was "buried" in the contract and that there was no meeting of the minds on the clause. Id. at 242, 243. The Court compelled arbitration on the basis of incorporation by reference, holding that "the focus of this court is not whether there was a subjective agreement to all clauses in the underlying contract but whether there was agreement to the contract embodying the clause in question." Id. at 243.

Although New York cases appear more restrictive than those decided under the Act, Matter of Level Export (Wolz Aiken & Co.),305 N.Y. 82 (1953), relied on by Instituto, supports S&R. There a salesnote stated that it was "subject to the provisions of Standard Cotton Textile Salesnote, which, by this reference, is incorporated as part of this agreement ..." The Standard note contained an arbitration provision. The buyer claimed that at no time was it informed or was aware that the standard note contained an arbitration provision; that the buyer was not a member of any association or textile group; that it never saw the applicable rules, nor was provided with a copy; that the seller never mentioned

arbitration until several months after the controversy arose. Id. at 82.

The court found that the Standard note had been sufficiently described to be incorporated by reference and rejected all evidence of subjective intent. Observing that the buyer was a sophisticated merchant, the court assumed it knew that the sales provisions were to have legal effect; that it accepted those provisions; that ignorance through negligence does not relieve a party from his contractual obligations; and that a party which

> "signs or accepts a written contract, in the absence of fraud or other wrongful act of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence to the jury as to his understanding" (emphasis supplied). Id. at 87.

Another attempt, similar to Instituto's, to introduce subjective intent was rejected in Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975), where the manager of defendant's New York company executed an agreement providing for the resolution of all controversies in West Germany. He then resisted litigation in the West German forum, contending that the contract was in German, a language he neither spoke nor understood; that he was not aware of it or he would not have agreed to it.

In rejecting evidence of subjective intent the court concluded:

> "'That his mind never gave consent to the terms expressed is not material ... If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him ...'" Id. at 366.

Here, Instituto has expressly relied and based its claim on (a) Guzman's letter of July 29 (which refers to a "Purchase Agreement ... to be remitted") (A108, 139) and (b) S&R's July 31, 1975 telex to Instituto (which refers to Contract 5437-F and "the complete details ... on the contract") (A109, 137).

Both documents, which Instituto admits constitute S&R's offer, clearly and unequivocably incorporate Contract 5437-F and the "complete details" therein, including the arbitration clause.

As in Level Export, supra, Instituto is a sophisticated merchant. When it accepted S&R's written offer it knew that the provisions of Contract 5437-F would have legal effect. As in Gaskin, supra, 390 F. Supp. at 367 there existed "no emergency condition or other exceptional circumstances" which would relieve Instituto from its obligation to procure and read

the contract in the three weeks which elapsed between the receipt of S&R's telex and shipment of the coffee. The coffee trade may well be "fast moving" but that cannot excuse Instituto's neglect. Instituto is bound to Contract 5437-F whether it read it or not.

In these circumstances there is no basis for Instituto's reliance on Lea Tai Textile Co., Ltd. v. Manning Fabrics, Inc., 411 F. Supp. 1404 (S.D.N.Y. 1975); Superior Shipping Co. v. Tacoma Oriental Lines, Inc., 274 F. Supp. 25 (S.D.N.Y. 1967); and A.B.C. v. AFTRA, 412 F. Supp. 1077, 1084 (S.D.N.Y. 1976). In Lea Tai the buyer's order required arbitration in New York and the seller's confirmation specified arbitration under the Hong Kong Code. Applying UCC §2-207, the court assumed that each party objected to the conflicting clause in the other's order. In Superior, after a trial, the court found that the counter-offer containing the arbitration clause was expressly repudiated. In A.B.C., the court found that a Washington employee expressly was excluded from a collective bargaining agreement which applied only to New York employees.

Here, there was no rejection or counter-offer by Instituto -- instead there was, acceptance by performance, of the

terms referred to in S&R's telex. Instituto has cited no case rejecting incorporation given the circumstances at bar. As Instituto's brief notes (footnote p. 31) the more restrictive state cases are not controlling under the Act. Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909, cert. dism., 364 U.S. 801 (1960). Even if they were, they are a far cry from S&R's telex, which made reference to and stated that the complete details of the offer were on a single, specific, numbered contract.

2. Instituto's UCC Arguments are Transparently Fallacious

Instituto's UCC §2-207 argument is a non-argument since there are no conflicting forms involved in the case at bar.

Instituto also fails to overcome S&R's reliance on UCC §1-205. The UCC is "a most appropriate source of federal law," In Re Yale Express Systems, Inc., 370 F.2d 433, 437 (2d Cir. 1966), a national law of commerce, United States v. Wegematic, Inc., 360 F.2d 674, 676 (2d Cir. 1966); Lea Tai, supra, 411 F. Supp. at 1405, and is applicable to questions of contract formation under the Federal Arbitration Act. Lea Tai, supra, 411 F. Supp. 1406.

Parties can assent to a written arbitration clause by acts, conduct, or in any way in which a party binds itself. A/S Custodia v. Lessin International, 503 F.2d 318, 320 (2d Cir. 1974); Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960); A.B.C. v. AFTRA, supra, 412 F. Supp. at 1084. UCC §1-205 merely sets forth certain acts or conduct, to be proven as facts, which would evidence a party's assent to a particular contractual provision.

Contrary to Instituto's contention, C. Itoh & Co. Inc., v. Jordan International Company, 552 F.2d 1228 (7th Cir. 1977), did not reject the application of custom and usage in such cases; it merely held that trade usage could not supply an arbitration clause specifically rejected by the parties. We submit that a specific, identifiable, written arbitration provision, consistently adopted through a course of dealing or usage of trade, can be enforced under the contract formation principles set forth in UCC §1-205. To the extent that Garnac Grain Co. v. Nimpex International, Inc., 249 F. Supp. 986 (S.D.N.Y. 1964), contradicts that principle, we submit it is in error.

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*Moreover, a course of dealing or usage of trade can assist the court in interpreting the expressions and conduct of the parties. UCC §1-205(1). These facts can only be developed at trial. See Point II, infra.

3. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Does Not Preclude S&R From Obtaining Relief Under the Federal Arbitration Act

Instituto asserts that S&R's reliance upon Section 4 of the Act "may be misplaced" because the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), [1970] 3 UST 2517, I.I.A.S. No. 6997, 9 U.S.C. §§201-208, may have supplanted or pre-empted that section. This conclusion is spurious. Not only does the statute lack any language to support such pre-emption but, in the rare instances where there has been an apparent conflict, the Courts have resolved the tension in favor of the Act rather than the Convention.

Where the Act provides a remedy, the party seeking relief is not required to establish its right to similar relief under the Convention. I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424 (2d Cir. 1974); Andros Compania Maritima, S.A. v. Andre and Cie, 430 F. Supp. 88 (S.D.N.Y. 1977).

The Andros court distinguished McCreary Tire & Rubber Company v. CEAT, S.p.A, 501 F.2d 1032 (3d Cir. 1974), the only U.S. case cited by Instituto,because that case had involved a conflicting remedy pursuant to state law rather than the Act. Andros Compania Maritima, S.A., supra, 430 F. Supp. at 90.

Therefore, it is clear that S&R may avail itself of the Act; it need not implement the Convention nor be bound to any alleged stricter requirements for a writing.

Moreover, Instituto's assertion that the Convention definition of an agreement to arbitrate "precludes incorporation by reference" is flatly contradicted by the law of this Circuit. Antco Shipping Co. v. Sidermar S.p.A., 417 F. Supp. 207 (S.D.N.Y. 1976); Compania Espanolade Petroleus, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975) cert. denied 426 US 936. In Midland Tar Distilleries v. U/T Lotos, 362 F. Supp. 1311 (S.D.N.Y. 1973), which did not involve the Convention but was held to be controlling in Antco Shipping Co., supra, the court stated:

> "It is well settled that arbitration is a creature of contract and that one cannot be compelled to arbitrate unless he has agreed to do so. Such an agreement need not be embodied in any single writing or document but rather, as the Court of Appeals for this circuit has made clear, a charter party and a bill of lading may be read together to form the complete contract of carriage between the parties. Son Shipping Co. v. DeFosse & Targhe, 199 F.2d 687, 688 (2d Cir. 1952). ... The bill of lading will be found to incorporate an arbitration clause contained in the charter party and will be made subject to it when the bill clearly refers to the charter party and the holder of the bill has either actual or constructive notice of the incorporation (emphasis supplied). Id. at 1311, 1312-3.

Finally, foreign courts of Convention member countries have recognized arbitration agreements over objections similar to those of Instituto. Judgment of February 14, 1970, Paris Appeals Court, Fifth Chamber (requirement that arbitration agreements be in writing met by a consistent course of commercial conduct covered by an arbitration clause). In a closely analogous case, a West German court upheld the validity and enforceability of an arbitral clause contained in a seller's confirmation letter where the buyer had remained silent.*

Thus, in the instant case, all the prerequisites to arbitration have been met.

POINT II

Instituto's Own Admissions Demonstrate Genuine Issues As To The Existence of "A Written Agreement For Arbitration." At The Very Least a Trial Must Be Held

Instituto attempts to foreclose the trial mandated by the Act by contending there is no "genuine issue" as to whether the parties made a written agreement to arbitrate. After repeatedly stating that no contract containing an arbi-

*These cases were obtained from International Commercial Arbitration, Ron Nestor, Special Rapporteur, United Nationals General Assembly, United Nationals Commission on International Trade Law Fifth Session, New York, 10 April 1972, pp. 71-76.

tration clause was delivered to Instituto, it quietly adds the phrase that no such contract was ever referred to (Inst. br., pp. 44 et seq.) The former assertion is questionable; the latter assertion is simply false.

Instituto's Mexican complaint explicitly relies on two documents -- Guzman's letter and S&R's telex -- as the basis upon which Instituto shipped 6,000 bags of coffee. Both of these documents made explicit reference to the terms of a written purchase agreement to furnish the "details" of the contract. This agreement contained an arbitration provision. If this Court is unwilling to order arbitration as a matter of law, at the very least there is a substantial issue which must be resolved by a plenary trial: did Instituto know or should it have known about the terms of the written agreement specifically referred to in the letter and the telex.

It is hornbook law that such a determination of the terms of a contract arising from correspondence present questions of fact for the jury unless a reasonable man could decide the case only one way. Transammonia Export Corp. v. Cousers, 554 F.2d 719 (5th Cir. 1977); Construction Aggregates Corp. v. Hewitt-Robins, 404 F.2d 505 (7th Cir. 1968) cert. denied 395 US 921. Instituto's attempt to label the arbitration clause "unidentified" in the face of the clear reference in the letter

and the telex must fail. Instituto's claim that its failure to even ask for the referenced purchase agreement was "reasonable and prudent" as a matter of law is ludicrous. If this Court has any doubt as to whether the contract incorporated by reference was described with sufficient specificity, this too is a question of fact which cannot be resolved absent a trial. Lowry & Co. v. S.S. LeMoyne D'Iberville, 253 F. Supp. 396 (S.D.N.Y. 1966).

The delivery of Contracts 5437-F or 5481 to Instituto also raise triable issues of fact. In In Re Les Belles Enterprises, 17 UCC Rep. 909 (N.Y. Sup. Ct. 1975), the party opposing arbitration denied ever receiving a written confirmation which contained an arbitration provision. The Court held that a hearing was required to determine whether the confirmation was received.

Even assuming arguendo that Instituto's summary judgment standard -- the "genuine issue" test -- is correct to determine the necessity of a trial under the Act, that standard is amply met here. Judge Hand's decision in Radio City Music Hall Corp. v. United States, 135 F.2d 715, 718 (2d Cir. 1943), relied on by Instituto, states that Instituto's evidence must

not be discredited as dishonest* and only requires S&R to specify "some instances that it had reason to suspect would contradict" Instituto.

Both of these tests have been met. Instituto claims that it never saw or received Contract 5437-F from Guzman. This is contradicted by Instituto's knowledge of its existence from Guzman's letter and S&R's telex; by the so-called "suppressed" letter from S&R to Guzman (Inst. br., pp. 20-21) directing Guzman to use the contract for registration purposes (thus he would have to file it with Instituto); by Instituto's failure to produce an affidavit from anyone who dealt directly with Guzman (thus its denial of delivery is double hearsay); and by Instituto's suspicious relationship with Guzman (see p. 7, supra). The situation is similar to Tubos De Acero de Mexico, S.A. v. Dynamic Shipping, 249 F. Supp. 583 (S.D.N.Y. 1966), cited by Instituto, where the court found a "genuine issue" requiring a trial and stated

> "The record before the court is far from a model of clarity. The affidavits by attorneys not possessing personal knowledge of the facts combine conclusions and legal arguments with evidentiary facts. Some of the critical features of the case

*Instituto's presentation in this case, including obvious mischaracterization and reliance on material outside the record, should be sufficient to resolve any doubts about Instituto's honesty against it.

> are shrouded in ambiguity. To the extent that the record is susceptible of close analysis, the extracted factual data warrants the conclusion that the issue raised is not fictitious or unreal." Id. at 591-592.

See also Office Employees International Union, Local 153, AFL-CIO . Ward-Garcia Corporation, 190 F. Supp. 448 (S.D.N.Y. 1961).

Further, the additional evidence to defeat Instituto's claim that it never received Contract 5437-F is in Instituto's own hands and cannot be obtained without a plenary hearing. In such a situation the Supreme Court has held that summary judgment is inappropriate. Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962). An unbroken line of cases in this Circuit since Doehler Metal Furniture v. United States, 149 F.2d 130, 135 (2d Cir. 1945), has held that "[a] litigant has a right to a trial where there is the slightest doubt as to the facts ..."*

The three cases cited by Instituto are inapposite. Ocean Industries v. Soros Associates International, 328 F.

*We have assumed, arguendo, that a summary standard applies only to show how, even under that standard, S&R has raised triable issues. However the cases, as well as the language of the Act ("If the making of an arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof") indicate that a party seeking arbitration need make a lesser showing than one resisting it. Instituto's authority, including Almanacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945), deal with a party resisting arbitration who must make an "unequivocal denial" that an arbitration agreement was made.

Supp. 944 (S.D.N.Y. 1971), is fully distinguished at pages 41-42 of S&R's main brief. A.B.C., supra, and District 2, Marine Engineers v. Falcon Carriers, 374 F. Supp. 1342 (S[illegible]974) deal with the question of whether particular disputes fall within the language of an arbitration provision in a collective bargaining agreement (in District 2, the Act is not even mentioned). Moreover, despite Instituto's statement that it made a telephone call and determined that no hearing was held in the A.B.C. case (another example of material outside the record and unsupported by affidavit) the opinion itself states that

> "Pursuant to Rule 65(a)(2), Fed. R. Civ. P., and with the consent of the parties, the Court ordered that the trial of the action on the merits be advanced and consolidated with the hearing of the plaintiff's application for preliminary relief." A.B.C., supra, 412 F. Supp. at 1079 (emphasis supplied).

Here Instituto consents to nothing and is desperately resisting cross-examination of its hearsay assertions.

Finally, Instituto's tortured argument about the distinction between S&R's pleadings and its proofs cannot stand. Even a cursory reading of Judge Pierce's decision makes it clear that he dismissed S&R's petition solely on the strength of the pleadings and without the "close analysis" of the record required by Tubos De Acero, supra.

Instituto's attempt to distinguish General Guaranty Insurance Co. v. New Orleans Insurance Agency, 427 F.2d 924 (5th Cir. 1970), again requires it to state "that there never was a delivery of a document referring to or containing an arbitration clause" (emphasis supplied)(Inst. br., p. 49). Again, this is incorrect. Instituto concedes delivery of two documents referring to and incorporating the terms of a written purchase agreement, including an arbitration clause. We believe Instituto should be held to knowledge of the terms of this agreement, including arbitration, as a matter of law. However, as this Court held in Interocean Shipping Co. v. National Shipping Co. v. National Shipping Trading Corp., 462 F.2d 673, 678 (2d Cir. 1972), if there is any question as to Instituto's knowledge, the Act commands that

> "[t]hese issues should not be determined on affidavits, but rather a full trial should be had."

POINT III

Sprague & Rhodes Should Not Be Divested of its Right to Arbitration on The Basis of Bogus Arguments Concerning Res Judicata the Balancing of Equities or Waiver

Point III of Instituto's brief -- its res judicata arguments -- are refuted in the first two points of this reply

brief as well as below. Additionally, concurrently with the filing of this brief, S&R will submit a motion to strike Point III of Instituto's Brief as improperly based on factual material outside the record.

Point IV of Instituto's brief asks this Court to "balance the equities." Instituto apparently would deem it equitable for this Court to approve its Mexican default judgment in the face of the following facts:

(a) S&R initially made a good faith effort to settle this action without litigation, but Instituto responded with an intemperate threat of criminal action and denunciation before international coffee associations (A32-33, 118, 229).

(b) S&R never entered an appearance on the merits in the Mexican action -- indeed under Mexican law it never appeared at all (A230, 235).

(c) Instituto's alleged default judgment against S&R was entered more than one year after this matter was submitted to the District Court. As described, supra, at pp. 2-4, Instituto obtained it only after stalling this appeal for a year with constant assurances to S&R that a settlement had been reached.

In light of these facts a true balancing of the equities here mandates arbitration.

It must be noted, moreover, that Congress and the courts have refused to sanction a "balancing of equities" here; the language in Section 4 of the Act is mandatory. The verb used is "shall," not "may."*

In Prima Paint Corp. v. Flood & Conklin, 388 U.S. 395, 403-404 (1967) the Supreme Court held that "Under §4 ... the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration ... is not in issue'" (emphasis supplied). This circuit has consistently enforced the literal mandate of Congress in Section 4. See Aaacon Auto Transport, Inc. v. Ninfo, 490 F.2d 83 (2d Cir. 1974).

Thus, there is no room for theorizing whether Mexico or New York is a better forum to resolve the dispute. If an agreement to arbitrate exists, Section 4 of the Act directs that the proceedings shall be conducted "in accordance with the terms of the agreement," i.e., in New York pursuant to the GCA rules. If no arbitration agreement exists further

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*As to similar mandatory language in Section 3, the Seventh Circuit concluded in C. Itoh, supra, 552 F.2d at 1321, that a district court has no discretion to consider sound judicial administration or economy in determining whether to stay arbitration.

litigation will be necessary to demonstrate that S&R is not subject to the jurisdiction of Mexico.*

Instituto's cases do not support its request for a denial of arbitration based on the equities. In Leesona Corp. v. Cotwood Mfg. Corp., Judson Mills Div., 315 F.2d 538, 541-542 (4th Cir. 1963), the Fourth Circuit merely "postponed" arbitration because a prospective federal court ruling on the merits could prove persuasive to the arbitrators' decision. Here Instituto is seeking to abrogate arbitration, not postpone it, and its Mexican default judgment could hardly prove persuasive with respect to the merits.

Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 987 (2d Cir. 1942), specifically declined to decide whether equitable defenses are available to a party resisting a demand for arbitration under Section 4 of the Act.

Instituto's out-of-context quote from Netherlands Curacao Co., N.V. v. Kenton Corp., 366 F. Supp. 744, 748 (S. D.N.Y. 1973), adds nothing to its cause since that case involved a contractual provision which expressly waived arbitration.

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*Certainly Instituto cannot defeat arbitration merely by alleging that necessary witnesses may be unavailable in New York because Instituto will prevent them from leaving Mexico (Inst. br., p. 15).

Contrary to Instituto's assertions, arbitration will result in a complete resolution of this dispute. Penagos was never sued by Instituto, and the duplicitous Guzman executed a settlement agreement with Instituto on February 25, 1976 in which he admitted liability (A182-188). Thus the only parties to the instant dispute are Instituto and S&R and they can obtain complete relief by arbitration. Bunge Corporation v. MV Furness Bridge, 390 F. Supp. 603 (E.D. La. 1974) is patently inapplicable. In that case there was no written agreement of any kind among the parties, the Act could not be invoked and not all of the interested parties had agreed to arbitration.

Instituto's waiver arguments are easily dismissed. Instituto also asserts that S&R had to initiate an arbitration proceeding before it was sued at the peril of waiving its right to arbitration. This contention was squarely rejected in General Guaranty, supra, where the Fifth Circuit states:

> "Requiring pre-suit demand will place on the party sought to be charged the duty to institute proceedings which may establish his own liability, though if he remains inactive the claims asserted against him may never be formally pressed in either arbitration or court proceedings (and in some instances may be wholly without merit)." Id. at 928.

The extraordinary situation in Freemont Cake & Meal Co. v. Wilson & Co., Inc., 183 F.2d 57 (8th Cir. 1950), hardly

justifies waiver here. Wilson sued Freemont in the federal district court on a contract specifying arbitration. Freemont successfully moved to stay the action pending arbitration. However, when neither party sought arbitration, Wilson discontinued his federal action and three months later started a state court action. Freemont did nothing for five months while the state court action proceeded. Id. at 59. Freemont then again went to the federal court and asked it to stay the state court action. The district court refused because Freemont had been "dilatory and obstructive." Thereafter, the state court action proceeded on the merits* and resulted in a judgment against Freemont. Indeed, the Fifth Circuit specifically found that "before [the second motion to stay under 9 U.S.C. §3] was instituted the actual substantive controversy between the parties had already been adjudicated by a court having jurisdiction both of the parties and the subject matter" (emphasis supplied). Id. at 59.

Waiver is not lightly inferred, Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968), and there is no basis for such an inference here. S&R did nothing dilatory or

*The earliest point at which preclusion may be found is when an answer on the merits is filed. Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291, 293 (2d Cir. 1965). Here S&R never appeared on the merits in Mexico; under Mexican law it never appeared at all!

obstructive. It commenced these proceedings promptly after being sued. Unless S&R's conduct gained it an undue advantage or resulted in prejudice to Instituto (which it did not), S&R cannot be held to have relinquished its right to arbitration. Liggett & Meyers v. Bloomfield, 380 F. Supp. 1044, 1047 (S.D. N.Y. 1974).

Instituto's complaint of prejudice is incredible. Instituto threatened S&R with a debt which it had already collected from Guzman -- Instituto's own receipts are in the record -- then unilaterally credited to Guzman's personal account (A28-31, 228-233). Instituto then started a lawsuit in Mexico and issued threats calculated to prevent S&R from defending (A32-36, 118, 236-237). Finally, Instituto took a default judgment under the pretext of reviewing a settlement agreement negotiated at great length and expense. Instituto would now deny S&R an opportunity to have this dispute decided on the merits claiming it has "expended public funds of Mexico attempting to settle amicably, or to litigate properly."

The effrontery of this claim is indicative of Instituto's high-handed conduct throughout this entire dispute. It is frankly disrespectful to this Court and should not be countenanced.

CONCLUSION

The judgment of the District Court must be reversed.

Respectfully submitted,

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(With appreciation for the
assistance of Judith Roth,
a 1977 law school graduate
who has not yet been admitted
to the bar).

Service of 3 copies of the
within Brief is hereby
admitted this 17th day of
Oct. 1977
Signed _____
Attorney for Respondent Appellee

COPY RECEIVED Under protest
Date: oct 17, 1977
Time: 2:30
Danziger, Bangser & Klipstein
Attorneys for respondent - appellee
By: Linda Smith